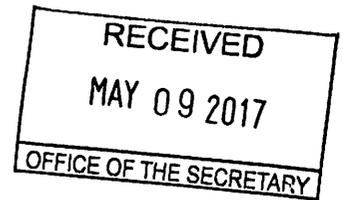


**HARD COPY**

**BEFORE THE  
SECURITIES AND EXCHANGE COMMISSION  
WASHINGTON, DC**



In the Matter of the Application of

SHAREMASTER

For Review of Action Taken by

FINRA

File No. 3-14104r

**FINRA'S BRIEF IN OPPOSITION TO REQUEST FOR STAY**

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May 9, 2017

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**FINRA'S BRIEF IN OPPOSITION TO REQUEST FOR STAY**

**I. INTRODUCTION**

This matter has a long and well-documented history. It stems from a 2010 FINRA Hearing Panel decision that found Sharemaster failed to file an annual report for 2009 audited by an accountant registered with the Public Company Accounting Oversight Board ("PCAOB"), in violation of Exchange Act Rule 17a-5. RP 1005-10.<sup>1</sup> The Hearing Panel suspended Sharemaster until the firm filed a conforming annual report and ordered that it pay costs totaling \$1,785.00. RP 1010.

Sharemaster appealed the Hearing Panel's decision to the Securities and Exchange Commission ("Commission"), claiming that it was exempt, under Exchange Act Rule 17a-5(e)(1)(i)(A), from the requirement that its annual report be audited by an accountant registered with the PCAOB. The Commission thereafter dismissed Sharemaster's application for review

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<sup>1</sup> "RP" refers to the record page numbers in the certified record.

after concluding that it lacked jurisdiction to review FINRA's action under Section 19(d) of the Securities Exchange Act of 1934 ("Exchange Act") for want of a live, coercive sanction.<sup>2</sup> *Id.*

On February 2, 2017, after reviewing the Commission's decision, the U.S. Court of Appeals for the Ninth Circuit remanded this matter to the Commission for further proceedings. *See Sharemaster v. SEC*, 847 F.3d 1059 (9th Cir.2017). The matter is currently before the Commission for briefing to address the Commission's jurisdiction over Sharemaster's application for review and, if jurisdiction exists, the merits of the firm's appeal. *See Sharemaster*, Exchange Act Release No. 80471, 2017 SEC LEXIS 1181 (Apr. 17, 2017) (order scheduling briefs on remand).

On April 26, 2017, Sharemaster moved, pursuant to Rule 401 of the Commission's Rules of Practice, for a "stay of execution" of FINRA's 2010 action.<sup>3</sup> Specifically, Sharemaster requests that the Commission stay the requirement that it file an annual report audited by a PCAOB-registered accountant that may theoretically be due while this matter is before the Commission.<sup>4</sup>

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<sup>2</sup> After filing its application for review, Sharemaster filed with FINRA a compliant 2009 annual report, and FINRA lifted the firm's suspension. *See Sharemaster*, Exchange Act Release No. 70290, 2013 SEC LEXIS 2597 (Aug. 29, 2013). FINRA also returned to Sharemaster the costs imposed by the Hearing Panel and notified the firm that FINRA would not seek to reassess those costs while the firm's appeal was pending before the Commission.

<sup>3</sup> Although dated April 26, 2017, the certificate of service that accompanied Sharemaster's stay request states that the firm caused the motion to be served on FINRA by U.S. Postal Service mail on April 27, 2017. FINRA received the motion on May 2, 2017. The motion is not eligible for expedited consideration under Rule 401(d)(3) of the Commission's Rules of Practice.

<sup>4</sup> Sharemaster also requests that there be no retroactive requirement to file annual reports audited by a PCAOB-registered accountant for the duration of the requested stay should the firm not prevail on the merits of its appeal.

FINRA opposes Sharemaster's stay request.<sup>5</sup> Sharemaster does not move to stay any sanction imposed as result of FINRA's 2010 action. Indeed, Sharemaster is not the subject of any live, FINRA-imposed sanction. The question of whether the firm is required to file an annual report audited by a PCAOB-registered accountant for any year other than 2009 simply is not an issue for the Commission's consideration. Sharemaster's appeal is an ill-suited vehicle for effectively requesting an indefinite exemption from complying with Rule 17a-5(d)'s requirements while the Commission considers the firm's application for review.

Moreover, Sharemaster has failed to meet the extraordinary burden that the Commission has consistently placed upon applicants that seek to stay the effectiveness of FINRA action. Sharemaster puts forth no specific or meritorious arguments in support of its stay request. Among other shortcomings, Sharemaster has not established that it is likely to prevail on the merits of its appeal or that it will suffer irreparable harm absent a stay. These failures alone warrant that the Commission deny Sharemaster's motion.

Accordingly, the Commission should deny Sharemaster's request for a stay.

## II. ARGUMENT

"[T]he imposition of a stay is an extraordinary and drastic measure." *William Timpinaro*, Exchange Act Release No. 29927, 1991 SEC Lexis 2544, at \*6 (Nov. 12, 1991). As the moving party, Sharemaster has the burden of establishing that a stay is warranted. *See Meyers Assocs., L.P.*, Exchange Act Release No. 77994, 2016 SEC LEXIS 1999, at \*8 (June 3, 2016). Sharemaster has failed to satisfy its burden.

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<sup>5</sup> FINRA reserves its right to make arguments regarding the Commission's jurisdiction, in accordance with the Commission's April 17, 2017 order. The Commission need not decide whether it possesses jurisdiction in this case to deny the firm's stay request. *See Whitehall Wellington Inv., Inc.*, Exchange Act Release No. 43051, 2000 SEC LEXIS 1481, at \*3 (July 18, 2000) ("We need not decide [jurisdiction], however, because even if there is no judicial barrier to consideration of WWI's appeal, WWI has not met the criteria for a stay.")

There is no consequential connection between the relief that Sharemaster requests in its motion for a stay and the FINRA decision that is the subject of the firm's application for review. Sharemaster is not under the threat of any sanction imposed as a result of FINRA's 2010 action during the pendency of this appeal. Whether the firm is entitled to an exemption from the requirement that it file an annual report audited by a PCAOB-registered accountant for any year other than 2009 is necessarily an abstract theoretical problem that cannot be resolved by Sharemaster's appeal and provides ill-suited ground on which to base a stay. *See Kabani & Co.*, Exchange Act Release 80403, 2017 SEC LEXIS 1095, at \*4 (Apr. 7, 2017) (concluding that, to obtain a stay, an applicant must show an injury that is "both certain and great and actual and not theoretical" (internal quotations omitted)). Even if the Commission determines it possesses jurisdiction and rules in favor of the firm on the merits of its appeal concerning FINRA's 2010 action, Sharemaster bears the burden of establishing that it is entitled to an exemption each year that it claims it. *See FCS Sec.*, Exchange Act Release No. 64852, 2011 SEC LEXIS 2366, at \*18 (July 11, 2011) ("Applicants bore the burden of establishing that they were entitled to the Exemption."); *see also* Exchange Act Rule 17a-5(e)(1)(ii), 17 C.F.R. § 240.17a-5(e)(1)(ii) (requiring an oath or affirmation that states the facts and circumstances relied upon for an exemption from the requirement that annual reports be prepared by an independent public accountant). The appeal currently before the Commission is necessarily divorced from the issues required to analyze a request that the firm effectively be granted an indefinite exemption from the requirement that it file annual reports audited by a PCAOB-registered accountant. *See Meyers Assocs.*, 2016 SEC LEXIS 1999, at \*20 ("This supposed need for the Commission to opine on FINRA's decision . . . is separate from the considerations relevant to whether to grant a stay."); *cf. In re N. Am. Co. and its Subsidiary Cos.*, 23 S.E.C. 60, 64 (1946) ("North American

has not connected this motion with any pending proceeding at all, but in facts appears to be seeking a separate . . . determination . . . apart from any pending matter.”). The firm’s apparent speculation about possible collateral consequences that it may face from its submission of annual reports yet to be filed is an insufficient basis for the Commission to grant the firm the stay relief it seeks. *See Donald L. Koch*, Exchange Act Release No. 72443, 2014 SEC LEXIS 2172, at \*6 (June 20, 2014) (finding that speculation about liability feared to occur at some indefinite time does not satisfy the requirements for a stay).

In addition, Sharemaster has not established any of the specific elements that the Commission has repeatedly articulated as necessary to prove that a stay is warranted. To obtain a stay, Sharemaster must show (1) a strong likelihood that it will prevail on the merits of its appeal; (2) that it will suffer irreparable harm absent a stay; (3) whether any person will suffer harm as a result of a stay; and (4) whether a stay is likely to serve the public interest. *See Kenny A. Akindemowo*, Exchange Act Release No. 78352, 2016 SEC LEXIS 2522, at \*4 & n.3 (July 18, 2016) (collecting cases). Under this standard, the first two elements are the most critical, and Sharemaster’s failure to demonstrate a likelihood of success on the merits or irreparable harm ordinarily is dispositive. *See Dennis J. Malouf*, Exchange Act Release No. 78739, 2016 SEC LEXIS 3308, at \*8 (Aug. 31, 2016); *see also Harding Advisory LLC*, Securities Act Release No. 10330, 2017 SEC LEXIS 985, at \*2 (Mar. 29, 2017).

First, Sharemaster’s motion sets forth no compelling argument that it is likely to succeed on the merits of its appeal. Sharemaster states only that “FINRA relies on an interpretation of the Exchange Act Rule which limits the use of the exemption” that the firm claims permitted it to file a 2009 annual report that was not audited by a PCAOB-registered accountant. FINRA’s 2010 action, however, was based on controlling Commission precedent, interpretations, and no-

action letters that are entitled to deference and directly contradict Sharemaster's argument. RP 901, 1005-10. Sharemaster's conclusory statements and general criticisms of FINRA's action fail to establish a strong likelihood of success on the merits. *See Michael David Schwartz*, Exchange Act Release No. 79798, 2017 SEC LEXIS 139, at \*4 (Jan. 13, 2017) ("Schwartz disputes the hearing officer's findings generally but provides no support for his conclusory contentions."); *Kabani & Co.*, 2017 SEC LEXIS 1095, at \*3-4 ("[B]ecause movants make no attempt to explain why they believe the Commission rejected their arguments . . . , they fail to present any basis to conclude that they are likely to succeed in their appeal.").

Second, Sharemaster fails to establish that it will be irreparably harmed in the absence of a stay. In its motion, Sharemaster claims only that "[t]he firm's crushing financial burden of paying for an audit by a PCAOB-registered accountant harms Sharemaster's financial viability and existence." The Commission, however, has refused repeatedly to grant stays based on claims that FINRA action will "negatively affect, or even close, a business." *See Meyers Assocs.*, 2016 SEC LEXIS 1999, at \*15 & n.17 (collecting cases). Congress mandated that the financial statements of broker-dealers be audited by PCAOB-registered accountants through the Sarbane-Oxley Act amendments to the Exchange Act. *Gremo Invest., Inc.*, Exchange Act Release No. 64481, 2011 SEC LEXIS 1695, at \*11 & n.15 (May 12, 2011). Any financial burden that Sharemaster may bear as a result of this requirement is thus based on "a Congressional determination that PCAOB registration would protect the public interest by ensuring more rigorous audits." *See id.* Although Sharemaster may suffer a financial detriment by complying with the PCAOB-accountant annual report requirement, this burden does not rise to the level of irreparable injury that warrants issuing a stay. "Mere injuries, however

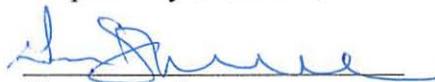
substantial, in terms of money, time, and energy necessarily expended in the absence of a stay, are not enough” to constitute irreparable harm. *Timpinaro*, 1991 SEC LEXIS 2544, at \*8.

Finally, Sharemaster makes no argument concerning the potential harm to third parties and the public interest. The Exchange Act’s reporting provisions are necessary to monitor the financial status of broker-dealers and to protect investors. *See Gremo Invest.*, 2011 SEC LEXIS 1695, at \*15. “The Sarbanes-Oxley Act established the PCAOB to oversee audits in order to protect investors and the public interest by promoting informative, accurate, and independent audit reports.” *Id.* (internal quotations omitted). The public interest thus weighs in favor of denying Sharemaster’s stay request. *See Meyers Assocs.*, 2016 SEC LEXIS 1999, at \*20 (“Applicants’ claimed harm . . . is outweighed by concerns about Applicants’ ability to comply with the securities laws and the threat . . . pose[d] to investors.”); *see also Schwartz*, 2017 SEC LEXIS 139, at \*9 (denying a motion for stay where the applicant did not make any argument concerning the potential for harm to third parties and the public interest).

### III. CONCLUSION

For the reasons discussed above, the Commission should deny Sharemaster’s stay request.

Respectfully submitted,



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Washington, DC 20006  
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May 9, 2017

CERTIFICATE OF SERVICE

I, Gary Dernelle, certify that on May 9, 2017, I caused the original and three copies of FINRA's Brief in Opposition to Request for Stay in the matter of the Application for Review of Sharemaster, Administrative Proceeding No. 3-14104r, to be served by messenger and facsimile on:

Brent J. Fields, Secretary  
Securities and Exchange Commission  
100 F Street, NE  
Room 10915  
Washington, DC 20549-1090  
Fax: (202) 772-9324

and by electronic mail and Federal Express Overnight Delivery on:

Howard Feigenbaum  
Sharemaster  
460 Tewell Drive  
Hemet, California 92545  
feigenbaum@sbcglobal.net

Service was made on the Commission by messenger and the applicant by FedEx and electronic mail due to the distance between the offices of FINRA and applicant's address.

Respectfully submitted,



---

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RECEIVED  
MAY 09 2017  
OFFICE OF THE SECRETARY

Gary J. Dernelle  
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Direct: (202) 728-8255  
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May 9, 2017

**VIA MESSENGER AND FACSIMILE**

Brent J. Fields, Secretary  
U.S. Securities and Exchange Commission  
100 F Street, N.E., Room 10915  
Washington, DC 20549-1090  
Fax: (202) 772-9324

Re: In the Matter of the Application of Sharemaster  
Administrative Proceeding No. 3-14104r

Dear Mr. Fields:

Enclosed please find the original and three copies of FINRA's Brief in Opposition to Request for Stay in the above-captioned matter.

Please contact me at (202) 728-8255 if you have any questions.

Very truly yours,

Gary Dernelle

Enclosures

cc: Howard Feigenbaum